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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/539,445	06/20/2005	Yoshinori Komatsu	Q88710	6821
65565 7590 05/28/2009 SUGHRUE-265550 2100 PENNSYLVANIA AVE. NW WASHINGTON, DC 20037-3213				
EXAMINER				
O HERN, BRENT T				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
05/28/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/539,445

**Applicant(s)**

KOMATSU ET AL.

**Examiner**

Brent T. O'Hern

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 21 May 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 2 and 4-8 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2 and 4-8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/CDC)
- Paper No(s) Mail Date \_\_\_\_\_

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s) Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 4/16/2009 has been entered.

### ***Claims***

2. Claims 1-2 and 4-8 are pending.

## **WITHDRAWN REJECTIONS**

3. All rejections of record in the Office Action mailed 10/16/2008 have been withdrawn due to Applicant's amendments in the Papers filed 4/16/2009 and 5/21/2009.

## **NEW REJECTIONS**

### ***Claim Rejections - 35 USC § 103***

4. Claims 1-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Castenmiller (US 4,874,626) in view of Clapp et al. (US 5,156,876) and Sejep et al. (US 3,849,580).

Castenmiller ('626) teaches a foamable composition such as a spread comprising a water-in-oil type emulsion (*See col. 3, ll. 27-52, col. 5, ll. 5-43, col. 6, l. 56 to col. 7, l. 15. The product is interpreted as being a foamable composition such as a spread, not a package, not a container and not a method of how it is made or used or*

*how it is placed into or taken out of the container or how it may be foamed or jetted.) comprising an emulsifier in the amount of 0.5 to 6.0 wt% based on the emulsion that is a glycerin fatty acid ester or an enzyme-processed lecithin used for preparing the water-in-oil type emulsion (See col. 6, l. 55 to col. 7, l. 15 where lecithin is added to provide as much as 4% phosphatides. The soybean plant is known to use biological enzymes in the synthesis of lecithin.) wherein the water-in-oil type emulsion comprises an edible oil, wherein the oil in the water-in-oil type emulsion is an edible oil which has a cloud point (ASTM) of about 4.4 °C (40 °F) or lower (See col. 5, ll. 5-43, col. 7, ll. 44-60 and col. 9, ll. 18-38 where both soybean oil and fat are included in the composition with soybean oil having a cloud point of about 14 °F as Applicant admits at page 6 of Applicant's Paper filed 5/21/2009 where Applicant refers to Table 5.3 of the Bailey's publication. The claims are interpreted as open due to the comprising language which do not prohibit the presence of hydrogenated fish oil and hydrogenated soybean oil as disclosed in Examples 1 and 5, as both are fats since they are solids at room temperature.), wherein an emulsifier and a gas propellant are usable as a spread (See col. 3, ll. 27-52, col. 5, ll. 5-43, col. 6, l. 56 to col. 7, l. 15. The product is interpreted as being a foamable composition such as a spread.), however, fails to expressly disclose a propellant dissolved in the emulsion.*

However, Clapp ('876) teaches dissolving propellants into foamable spreadable fat/oil type compositions containing water in some formulations in aerosol containers having a discharging nozzles wherein foam can be generated at the time of jetting (See Abstract, col. 5, ll. 14-31 and col. 5, l. 61 to col. 7, l. 24.) for the purpose of providing a

stable food material that can be added to other foods without introducing undesirable flavors and colors (*See col. 3, ll. 20-33.*).

Sejap ('580) teaches dissolving propellants into foamable spreadable butter, margarine -type compositions that are placed in aerosol containers having a discharging nozzles wherein foam can be generated at the time of jetting (*See col. 1, l. 23 to col. 2, l. 18 and col. 3, ll. 12-35.*) for the purpose of providing a stable, spreadable food material that does not need to be refrigerated (*See col. 1, ll. 13-51.*).

Therefore, it would have been obvious to a person having ordinary skill in the art at the time Applicant's invention was made to dissolve a propellant into Castenmiller's ('626) composition and place it in an aerosol dispenser as taught by Clap ('876) and Sejap ('580) in order to provide a stable food that in some instances does not need to be refrigerated.

#### **ANSWERS TO APPLICANT'S ARGUMENTS**

5. In response to Applicant's arguments (*p. 5, paras. 4-6 of Applicant's Paper filed 4/16/2009*) that Castenmiller ('626) does not teach the new emulsifier limitations because the Admmul emulsifier is at most 0.2 wt %, it is noted as discussed above that Castenmiller ('626) teaches where lecithin is added to provide as much as 4% phosphatides (*See col. 6, l. 55 to col. 7, l. 15.*).

6. In response to Applicant's arguments (*p. 5, par. # (ii) of Applicant's Paper filed 4/16/2009*) that the claims do not claim crystallized fat and Castenmiller ('626) requires fat, it is noted as discussed above that the claims are open and do not prohibit fat in addition to oil.

7. In response to Applicant's arguments (*p. 5, par. # (iii) of Applicant's Paper filed 4/16/2009*) that one would not add propellant to Castenmiller's ('626) product because its composition already has gas before being packed and bubbles would deflate, it is noted that gases serve two different purposes. The first is to make the composition light, fluffy and easy to spread while the second purpose is to make the material dischargeable from a container. If one were to spoon a creamy material with bubbles into a canister the bubbles within the material would not make the material sprayable but rather a propellant needs to be added so the material can be discharged in a desirable manner.

8. In response to Applicant's arguments (*pp. 6-8 of Applicant's Paper filed 5/21/2009*) that Castenmiller ('626) does not teach an oil with the newly set forth cloud point, it is noted as discussed above that the claims are open, thus allowing for fats in addition to oils. The arguments set forth in the Paper filed 5/21/2009 are substantially directed to the new cloud point limitations.

9. Applicant is advised to include all of the submitted non patent literature in an IDS as they are material to the amendments to the Specification and the claims.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brent T. O'Hern whose telephone number is (571)272-0496. The examiner can normally be reached on Monday-Thursday, 9:00-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Sample can be reached on (571) 272-1376. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Brent T. O'Hern  
Examiner  
Art Unit 1794  
May 24, 2009

/Elizabeth M. Cole/  
Primary Examiner, Art Unit 1794